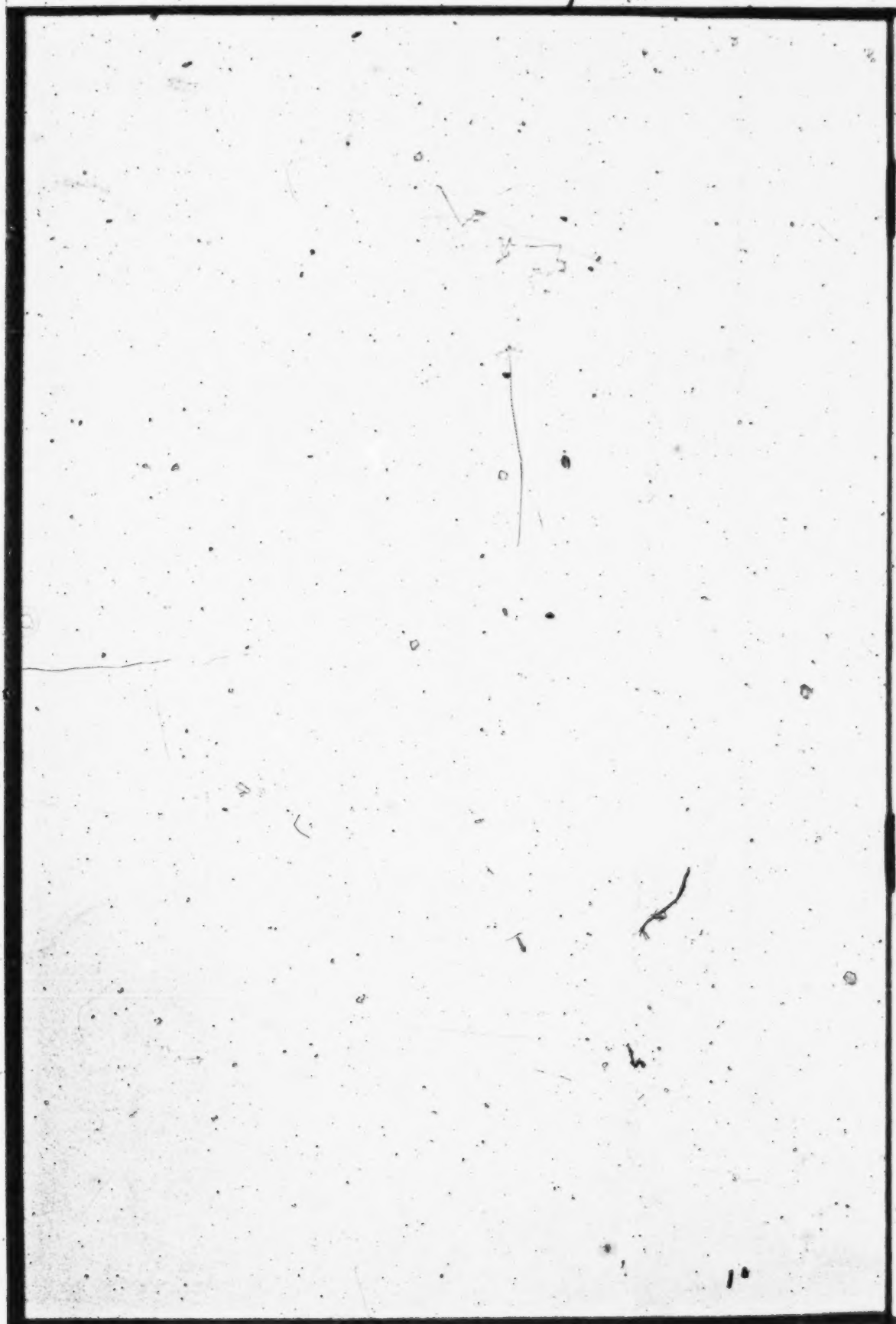

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 1067

MILLER BREWING COMPANY,
a Wisconsin corporation,

Appellant,

v.

THEODORE JONES as Director of Revenue
of the State of Illinois,

Appellee.

On Appeal from the Supreme Court of the State of Illinois

MOTION TO DISMISS

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Motion to Dismiss

Theodore Jones, as Director of Revenue of the State of Illinois, appellee herein, by William G. Clark, Attorney General of the State of Illinois, pursuant to Rule 16-1(b) of the Revised Rules of the Supreme Court of the United States, moves to dismiss this appeal on the ground that it does not present a substantial federal question.

ARGUMENT

I.

THIS APPEAL DOES NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION PERTAINING TO THE TAXATION OF TANGIBLE PERSONAL PROPERTY IN INTERSTATE COMMERCE.

Miller Brewing Company, plaintiff-appellant, is in the primary business of manufacturing malt beverages which are sold through wholesale distributors and various retailers within the State of Illinois (Abst. 36.)[1] To stimulate a demand for its products, the plaintiff directed the manufacture and fabrication of certain "point of sale" advertising material (hereinafter referred to as POS) (Abst. 36).

These POS advertising items which are in issue herein were manufactured to the specifications of the plaintiff by organizations outside of the state (Abst. 38). The plaintiff paid for said items and directed their shipment to Illinois wholesale distributors (Abst. 38). Ultimately this tangible personal property was distributed to various retailers for the benefit of Miller Brewing Company (Abst. 40). No cost was assessed to either the wholesaler or retailer (Abst. 40).

The first question with which we are confronted is whether the State of Illinois may constitutionally exact a tax upon the aforementioned tangible personal property.

1.) Evidentiary references are made to the Abstract of Record in the Supreme Court of Illinois which is included in the Certified Transcript of Record in the Supreme Court of the United States.

The use of tangible personal property may be taxed where said property has been shipped into a state after it has come to rest within the territorial limits of the taxing state. 129 A. L. R. 221-239; 153 A. L. R. 609-635; 41 A. L. R. (2nd) 535-538.

In essence, the plaintiff contends that the imposition of the use tax on the aforementioned point of sale of tangible personal property, which was purchased and manufactured outside of Illinois, creates an unconstitutional burden upon interstate commerce. The cases which the plaintiff has cited as authority for this proposition are distinguishable for either the property involved therein was never within the territorial boundaries of the taxing state or it was merely in transit through said state.

The tangible personal property, which is the subject matter of this suit, falls within the taxing jurisdiction of the State of Illinois, for although it was manufactured elsewhere, it came to rest in Illinois for use and consumption. Under these circumstances, the State of Illinois could properly impose a use tax upon said POS items. The issue then becomes whether appellant can be made liable for this tax.

II.

THIS APPEAL DOES NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION PERTAINING TO THE TAXATION OF MILLER BREWING COMPANY IN ITS EXERCISE OF A RIGHT AND POWER INCIDENT TO OWNERSHIP OF TANGIBLE PERSONAL PROPERTY IN THE STATE OF ILLINOIS.

Section 3 of the Illinois Use Tax Act (Ill. Rev. Stats. 1963, Ch. 120, Par. 439.3) imposes a tax upon the privilege of using tangible personal property within the State.

Section 2 of the Illinois Use Tax Act (Ill. Rev. Stats. 1963, Ch. 120, Par. 439.2) defines "Use" by providing in part:

> "'Use' means the exercise by *any* person of *any* right or power over tangible personal property incident to the ownership of that property. . . ." (Emphasis added.)

The question is now whether the plaintiff, in view of the facts herein, falls within the purview of Sections 2 and 3 of the Illinois Use Tax Act.

In the first instance, the Illinois Supreme Court ruled, that plaintiff which had the burden of proof on the issue did not allege sufficient facts[2] to establish that it was not the owner of these goods in Illinois. Plaintiff contracted for and directed the manufacture of the POS items (Abst. 37); expended corporate funds for their payment (Abst. 38); and directed its shipment to their wholesale distributors (Abst. 37).

They nebulously assert that they never owned the property or never intended to assert any control or use of it. The Illinois Supreme Court found they clearly originally owned it because they ordered it, paid for it, and directed its disposition. The assertion that they somehow disposed of title before the goods came into Illinois is contrary to the basic elements of corporate law for the directors and officers of a corporation may not make a gift of corporate assets. *McQuillen* v. *National Cash Register Co.*, 27 F. Supp. 639, affirmed CCA, 112 F. 2d 877; *cert*, denied, 311 U. S. 695, rehearing denied, 311 U. S. 729; *Wisconsin Department of Taxation* v. *Belle City Malleable*

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2) Illinois is a fact pleading jurisdiction. See opinion of Illinois Supreme Court.

Iron Co., 45 N. W. 2d 68 (Wisc.); 19 C. J. S. *Corporations* sec. 768. It is presumed that the corporation and its directors intended to act in a lawful manner. *Livingston* v. *Meyers*, 6 Ill. 2d 325; *Barrows* v. *Kenosha Co.*, 98 N. W. 2d 461 (*Wisc.*).

Thus this would negate any intent on the part of the plaintiff to expend such a large sum of corporate funds without title remaining in the corporation. Certainly if the goods were destroyed within the state of Illinois the insurance proceeds or casualty damages would be recouped by plaintiff; rather than the wholesale distributors receiving a $600,000.00 windfall at the expense of the plaintiff's shareholders.

The plaintiff was the owner of the property when it purchased it with corporate funds and since it did not divest itself of title by gift or pursuant to sale, it owned the property in Illinois. By necessity some right or power over the property, incident to the ownership thereof, was exercised by the plaintiff in Illinois. Therefore they are subject to the tax liability imposed by Section 3 of the Use Tax Act.

The Illinois Supreme Court, in commenting upon the position taken by Miller Brewing, stated:

> "Paragraph 14.8 of the complaint alleges that if the plaintiff at any time acquired any ownership, title or interest in and to any of the items, and we have held that it did, 'any such ownership, title or interest was relinquished by the plaintiff * * *.' Here, again, the complaint studiously fails to allege facts.
>
> "In the context of this statute, we are unaware of the meaning of an allegation that title, interest or possession has been 'relinquished.' The complaint nowhere alleges that the items were sold to the Illinois wholesale distributors or to anyone else. The allega-

tion that the plaintiff did not increase prices to its wholesalers to cover these items seems designed to negative a sale, and in the trial court the plaintiff did not argue that a sale had taken place. Similarly, there is no allegation that the items were given by the plaintiff to the Illinois wholesalers or to anyone else. The original complaint alleged that these items "are furnished gratuitously to the several independent distributors of Plaintiff." During the argument before the trial court the plaintiff refused to concede that there had been a gift, and in its amended complaint, filed after that argument, the allegation that the items were 'furnished gratuitously' was omitted.

"The complaint has been carefully drafted to avoid a plain and a simple statement of the actual transactions between the plaintiff and the wholesale distributors. Whether this was done in order to avoid taking a position that might result in the imposition of a tax upon its wholesale or retail distributors, we do not know. Like the circuit court, we must determine the legal sufficiency of the amended complaint that the plaintiff has chosen to file, and in our opinion the circuit court properly held that it failed to establish the illegality of the use tax proposed to be assessed against the plaintiff."

Arguendo, even if, as plaintiff suggests, it did not own the property, as such, within the State of Illinois, it is liable for the tax thereon if it exercised *"any"* right or power over the personal property incident to the ownership of it. It did not have to own the property to be subject to the Use Tax Act.

The question is, what is an incident of ownership?

The chief incidents of ownership of property have been defined to be the right to its possession, the right to its use and the right to its enjoyment. (73 C. J. S., *Property,* Sec. 13; *Zadworny* v. *City of Chicago,* 380 Ill. 470; *Cuneo*

v. *City of Chicago*, 379 Ill. 488.) Enjoyment has held to by synonomous with "benefit". *C. I. R.* v. *Homes Estate*, 326 U. S. 480; *Tips* v. *Bass*, 21 F. 2d 460; *In re Oglesbay's Estate*, 113 N. E. 2d 726 (Ohio).

In view of the fact that the plaintiff admits that the property was manufactured and funds expended to its ultimate benefit, it is clear that it is exercising a right over tangible personal property incident to the ownership of it and thus falls within the purview of the Use Tax Act.

It is not required that the plaintiff exercise all of the rights and powers incident to the ownership, but rather one is sufficient, and it has clearly exercised at least one of the rights incident to ownership: Enjoyment.

The plaintiff suggests that the State of Illinois has not afforded it any protection in regard to the property herein. It concludes that the State is therefore unable to tax the property. The State of Illinois offers the plaintiff or anyone in possession of these items the full protection offered to any other goods situated within the territorial jurisdiction of its boundaries. If the property were destroyed, the plaintiff could use the force of Illinois law to seek reimbursement, either from insurance or suit for property damage; if it were stolen or criminally damaged, the provisions of the Illinois Criminal Code would be applicable. Plaintiff's contention is unmeritorious.

The plaintiff has exercised a right and power incident to the ownership of tangible personal property in the State of Illinois and is therefore liable for a use tax thereon, either on the basis that it was the owner in fact of said tangible personal property or that it received a benefit from its use within the State of Illinois.

III.

THIS APPEAL DOES NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION PERTAINING TO THE IMPOSITION OF A TWENTY-FIVE PER CENT PENALTY FOR THE FAILURE TO FILE A TAX RETURN.

Section 12 of the Use Tax Act (Ill. Rev. Stats. 1963, Ch. 120, Par. 439.42) and Section 12 of the Service Use Tax Act (Ill. Rev. Stats. 1963, Ch. 120, Par. 439.42) specifically incorporate Section 5 of the Retailers' Occupation Tax Act (Ill. Rev. Stats. 1963, Ch. 120, Par. 444) which require the imposition of a twenty-five per cent (25%) penalty where the taxpayer fails to file a return. The incorporation of Section 5 of the Retailers' Occupation Tax Act into the Use Tax Act and the Service Use Tax Act is valid and that provision is a subsisting part of the latter Acts. *Turner* v. *Wright*, 11 Ill. 2d 161, *App. dis.* 355 U. S. 65.

The plaintiff contends that this penalty is unconstitutional for it deters the average taxpayer from resorting to the courts for judicial relief and is invalid because the tax is not uniform.

The plaintiff relies upon the proposition that a penalty is unconstitutional for lack of due process if that penalty is so great as to intimidate or deter a reasonable person from resorting to the courts to test the validity of the tax. The general rule is that the liability for a penalty cannot be avoided upon the ground of the taxpayer's belief or contention entertained or made in good faith that he is not liable for the tax if the State affords an adequate opportunity for safely testing the validity of the tax without liability for a penalty. 51 Am. Jur., *Taxation*, sec. 975.

Thus the question evolves of whether the State of Illinois afforded the plaintiff any method to test the validity of the proposed assessment without incurring liability for the twenty-five per cent (25%) penalty imposed by Section 5 of the Retailers' Occupation Tax Act.

Section 2a of the Public Money Act (Ill. Rev. Stats. 1963, Ch. 127, Par. 172) permits a taxpayer to place an amount equal to the proposed assessment on deposit with the State Treasurer in a protest fund. It further provides for the filing of a claim for refund and review of the proposed assessment under the Illinois Administrative Review Act.

On June 4, 1964, the Department of Revenue audited the books and records of Miller Brewing Company in its Milwaukee offices (Abst. 40) Thereupon the plaintiff was advised of a proposed assessment in the amount of $15,-634.76 under the Illinois Use Tax Act (Abst. 41) and $2,-262.28 under the Illinois Service Use Tax Act (Abst. 44). These proposed assessments included no penalties. At this point the plaintiff could have sought relief as aforementioned under Section 2a of the Public Money Act without incurring any liability for payment of a penalty regardless of the decision on administrative review. However, plaintiff did not act but waited until it was subsequently advised of the addition of the twenty-five (25%) per cent penalty, as required by Section 5 of the Retailers' Occupation Tax Act before filing the instant action in chancery.

Thus the State of Illinois having offered alternative remedies to the plaintiff herein; one, a remedy by which it could test the validity of the tax without subjecting itself to a penalty; the constitutional requirements of due process were met and satisfied. In the case at bar the penalty imposed is as a result of the plaintiff's own choice

and the penalty itself does not deter a reasonable person from resorting to the courts to test the validity of the tax.

The Supreme Court held in relation to plaintiff's allegation:

> "In our opinion the penalty provisions do not deprive the plaintiff of its constitutional rights. As is true of many other taxes, the information from which the amount of these taxes must be computed is peculiarly within the knowledge of the taxpayer. In *Helvering* v. *Mitchell*, 303 U.S. 391, 82 L. Ed. 917, the validity of sanctions designed to ensure full and honest disclosure was sustained, and their civil rather than criminal character was recognized. The imposition of a 25% penalty for failure to file a return has been approved in many cases. (*Offutt* v. *Commissioner*, (4th cir. 1960) 276 F. 2d 471; *Henningsen* v. *Commissioner*, (4th cir, 1957) 243 F. 2d 954; *McAlpine Land & Development Co.* v. *Commissioner*, (4th cir. 1942) 126 F. 2d 163; *Noteman* v. *Welch*, (1st cir. 1939) 108 F. 2d 206.) Other than its asserted belief that it was not liable to pay the taxes, the plaintiff has shown no reason to justify its failure to file a return; similar assertions have been held ineffective to avoid a penalty for failure to file a return. See, *eg. Heman* v. *Commissioner*, (8th cir. 1960) 283 F. 2d 227, 233."

The plaintiff has been afforded alternative remedies. It chose to ignore the remedy which would bar the mandatory imposition of the twenty-five per cent (25%) penalty clause assessed herein. Rather it chose to contest the validity of the tax in the present chancery action. The penalty assessed is a result of the plaintiff's actions and that penalty under the facts herein is not unconstitutional.

CONCLUSION

In view of the foregoing, it is respectfully submitted that this appeal should be dismissed for failure to state a substantial Federal question.

Respectfully submitted,

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